APPENDIX B

Oral Decision of the Superior Court of the State of Washington, Thurston County October 27, 1965

Well, of course, as counsel knows this is an unusual case. Neither counsel have cited in the Court's opinion any case directly in point concerning the matter.

The first problem that the Court is concerned with, of course, is the status to be sued. Can the Makah Indian Tribe as a corporation sue in this matter representing each of its members? Now, this has given the Court some concern and there have been no cases cited. The rules of Practice and Procedure have been cited.

By the Stipulation of Facts—the Court was concerned prior to the Stipulation of Facts as filed here—and I presume that counsel meant this that in the Stipulation of Facts it is conceded that there are certain Makah Indians who are buying these cigarettes at eleven cents additional per pack; therefore, they have gotten over one hurdle the Court was facing which was as to whether there would be any proof. The Court now does not have to worry about having to take judicial notice of the fact that there would be Makah Indians that were smoking. It would appear by the Stipulation of Facts that has been satisfied.

Now, the Court is of the opinion as a result of the power invested in the Makah Indian Tribe and into the commerce clause of the United States Constitution whereby they use the term "tribe" and where it is alleged that this action is brought on the basis of rights accruing to the Indians pursuant to the commerce clause of the United States Constitution and also the stipulation that the Makah Indian Tribe is a Federal corporation representing all Indians of the Indian Tribe; the Court is going to hold at this time that the Makah Indian Tribe as a Federal corporation has the right to sue on behalf of the Makah Indians in this matter.

Now, there have been several arguments by the defendants in this matter that they have no standing under the declaratory judgment to bring this action, but when these facts are argued as to whether they have no right because this is a remote tax, it is not a tax directed at them, we still get back to the merits because if under the facts and merits of this case—regardless of the fact that this tax may be upon a wholesaler outside the Indian Reservation—but if in the merits it is shown that this violates the commerce clause of the Constitution as to the rest of the Indian tribe or violates any of the Federal statutes passed pursuant thereto, then they have a standing to be in Court. On that basis the Court will not dismiss this action, but will then go to the merits of the matter.

Now, of course, the most recent case is the *Warren Trading Post Company* case, but in reading the *Warren Trading Post* case very carefully, the Court is of the opinion that although this reiterates as stated by the defendants' counsel the law in the United States as to commerce on the Reservation, the Court does not feel that the *Warren Trading Post* case answers the question which is before the Court at this time: The problem as to whether either the commerce clause of the United States Constitution or the laws as passed by Congress pursuant to the power given them under the commerce clause has gone so far as to cover this situation where the tax is imposed on a wholesaler outside the Reservation and where then he sells to a retailer or factor on the Reservation.

Now, Plaintiff argues that the Bureau of Indian Affairs by their rules and regulations and by the powers given them, and he argues by inference that he has the right to control the quality and price of goods sold to the Indians.

Now, the Court in its study of these cases and in the *Warren Trading Post* case has never found a case where there is any rule or regulation or any case where the Bureau of Indian Affairs has attempted to look to the

quality and price of the goods of a wholesaler selling to a factor on the Indian Reservation. It would appear that those rules and regulations in the mind of the Court were applied to the factor to protect the Indians from high prices and poor goods sold by the factor or trader directly to the Indians.

The real question the Court feels in this case is to whether commerce with the Indians extends to a wholesaler living and doing business off the Reservation. The Court has been unable as he previously stated to find any cases in point.

Now, there has been some criticism or some argument made as to the type of tax which is imposed in this matter which the Court should comment on. It is the Court's opinion that although the terms "sale, sale use, wholesaling, handling" is used, that these were catchalls to cover all possibilities as far as being assured that this tax was paid, and that by the Stipulation of Facts, in this State actually the burden of paying, not collecting, but paying this tax has fallen upon the wholesaler in the State of Washington, and that the wholesaler has the right to decide whether he will pass this on.

Now, the Court does not mean to be naive. In this eleven cents tax on each pack of cigarettes, the Court is going to have to presume the wholesaler will pass this tax on, but by that very fact it is hard for the Court to see how this tax as paid by the wholesaler can be said to be a tax directly on Indian commerce.

It certainly cannot be said as a matter of fact when the wholesaler pays that tax on a pack of cigarettes that he has to sell whether he knows where each cigarette is going to be sold and that those cigarettes will be sold in Indian commerce at that time.

Now, the only case the Court can find that relates to the possible philosophy of a person who may be immune from a tax either by Federal statute or by Constitution is the case of Alabama versus King and Boozer, and al-

though only dealing with the sales tax and not dealing with Indians, the Supreme Court of the United States has held that even though the tax was indirectly borne by the United States who actually was immune from that tax would be paid by the United States Government not to the State of Alabama but actually to the contractors to reimburse them for taxes which they had paid, and this is an indirect tax if you want to call it such.

An additional problem that was raised by the Defendant in this matter and not lightly taken by the Plaintiff was that for the Court to hold that the state cannot impose this tax on a wholesaler would mean that you are faced with the problem if this wholesaler had to pay the state this business and occupation tax and by some analysis it could be shown that there was a certain percentage per pack which would be attributable and to be collected from the Indians, and this would be a state tax, a wholesale and excise tax, or a sales tax, the Indians then would have the right to have this refunded. I don't mean to carry this to the extreme, but the Court can certainly see the difficulty of this type of philosophy in allowing this type of tax to be considered as a direct tax on the Indians and therefore a tax on Indian commerce.

The Court in reading the *Warren Trading Post* case is certain a limitation is placed by a wording by the United States Supreme Court which limited it only to factors who were licensed. This wasn't any unusual extension of the power of the factor himself who was governed by a licensing provision and by the laws laid down by the Congress pursuant to the commerce clause. They were actually governed by the United States Government through the Bureau of Indian Affairs and the Court held that by having taken jurisdiction over traders or factors that the state was interfering with Indian commerce by attempting to impose a tax upon the Warren Trading Post.

In this case we are not dealing with this situation at all. The Court has not been apprised of any legislation where the Congress of the United States Bureau of Indian

Affairs have ever attempted to regulate someone who was dealing in a wholesale capacity with a retail merchant or retail trader upon an Indian Reservation.

The Court is therefore of the opinion that the injunction will not lie in this matter. The Court will dismiss this action on the basis that this is a remote tax, it is not a direct tax upon the Indians in this matter, and is therefore not covered by the commerce clause of the United States or by any actions of Congress in relation thereto and, of course, the Court finds no violation of the State Constitution as such.

I might state in closing the only problem the Court can see in this as to anything else is probably the matter of the degree, and the Court will agree with counsel for the Plaintiff that in this matter the raising of the previous retail price to the Indians is large and whether the Court might take some consideration of the fact that this is so much of a raise that it might be considered as a tax on the Indians directly or indirectly, the Court has found no guideline and the Court does not feel without some guideline that the trial court in this matter can rule otherwise than it has. Therefore, the Court will sign the appropriate order and decree.